Filed 1/14/09 P. v. Logan CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID GEORGE LOGAN, JR., Defendant and Appellant.	G039796 (Super. Ct. No. 06NF1346) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed as modified.

James Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged David George Logan, Jr., with second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c), count 1);[1] carrying a loaded firearm in public by a felon (§ 12031, subd. (a)(1) & (a)(2)(A), count 2), and possession of a firearm by a felon (§ 12021, subd. (a)(1), count 3). As to count 1, the information alleged Logan personally used a firearm in the commission of the offense (§ 12022.53, subd. (b)). Also alleged were two prior strike convictions (§§ 667, subds. (d) & (e)(2)(a), 1170.2, subds. (b) & (c)(2)(A)), and one prior serious felony conviction (§ 667, subd. (a)(1)). After the trial court denied his motion to suppress evidence, Logan pled guilty to all counts and admitted all allegations. The trial court exercised its discretion pursuant to section 1385, struck two prior convictions, and sentenced Logan to a total term of 17 years in prison.

On appeal, Logan contends the court erroneously denied his motion to suppress all physical evidence seized during the search of his apartment. We find no error. We affirm the judgment as modified to grant Logan one additional day of actual custody credit and to accurately reflect that counts 2 and 3 were stayed pursuant to section 654.

FACTS

Anaheim police officers responded to an apartment complex on Alameda Avenue in Anaheim at 6:00 a.m., to locate a vehicle or suspect that had been involved in a robbery a few hours earlier. A license plate number provided by a witness to the robbery led the officers to a second-floor apartment at the Alameda Avenue address. When the officers arrived, they observed a car with the license plate number the witness had provided. The car was "warm." The officers also observed a man, later identified as Logan, who matched the suspect's description. Logan was detained.

---

[1] All further statutory references are to the Penal Code.

As officers were positioned outside the apartment, they were advised by the officer detaining Logan there was a handgun located in a white sock in a kitchen cabinet. Officers shouted into the apartment through the open door ordering anyone inside to come out. Logan's wife, Gayvon Logan (Gayvon), came to the door and told the officers there was a small child sleeping in one of the bedrooms. Officers then entered the apartment and while one officer remained with Gayvon in the living room, others conducted a protective sweep of the apartment for other suspects. Fearing the gun that had been described could be a threat to himself or his fellow officers, one of the officers went immediately to the kitchen where he located and seized a gun in a sock in a kitchen cabinet.

After the sweep was completed, officers asked Gayvon for consent to search the apartment and her vehicle. Gayvon signed the consent form provided to her by one of the officers. The prosecution offered the signed consent form and testimony regarding how Gayvon's consent was obtained. An officer testified Gayvon was asked if she would consent to a search of her apartment and her vehicle and she said, "Yeah." The officer described Gayvon's demeanor as calm, but concerned. When he presented the consent form to Gayvon, he asked her "to read it and [to] understand it." Gayvon was advised she could ask questions about the form if she had any. Gayvon appeared to read the form, did not ask any questions, and then signed the form.

Gayvon described the consent scenario very differently. Gayvon testified she had just awakened and was walking toward the restroom when she heard someone say "Anaheim P.D." When she walked into the living room, she observed officers with their guns drawn. The lights were off, and she could see her husband handcuffed. Gayvon was dressed in only a T-shirt and panties. Gayvon walked over and sat on the sofa in the living room. Gayvon testified she was not allowed to go anywhere and remained on the sofa. Eventually, one of the officers told Gayvon her

husband fit the description of a robbery suspect. Later, one of the officers searched her.

Regarding the consent form, Gayvon testified that when she was asked to give her permission to search, an officer told her Logan had already consented to the search. Specifically, the officer had said, "Ma'am, your husband has given us permission to search the house. But since you live here, we would like your permission, as well." Her response was, "I guess so." She acknowledged signing the consent form, but then said she understood she was only consenting to a search of her vehicle because that is what the officer told her.

The parties stipulated there was no search warrant or arrest warrant. Logan argued there was no justification for the officers' entry into the apartment or for the subsequent search. He contended Gayvon's consent was not voluntarily given, and, even if the consent was determined to be voluntary, it was vitiated by the officers' illegal conduct. Logan urged the court to suppress all evidence seized.

The prosecution conceded the officers did not have justification to conduct a protective sweep, but argued, in spite of the illegal activity, there were compelling reasons why the motion should be denied. The prosecution asserted Logan had given up any expectation of privacy when he informed the officers of the gun's location in his kitchen, and there was no Fourth Amendment violation in the discovery of the gun. Even if Logan was entitled to an expectation of privacy, the prosecution argued the information regarding the secreted gun gave the officers the right to secure the residence pending the issuance of a search warrant. Had a search warrant been obtained, the gun would have been seized. Therefore, the prosecution argued, the officers did not gain anything from their illegal activity. Additionally, the subsequent consent by Gayvon was sufficiently attenuated from the illegal conduct so as to render the search legal.

The prosecution admitted there were conflicts in the testimony regarding the voluntariness of Gayvon's consent, but maintained the evidence established the consent was voluntary and valid. It argued that although the gun was seized before Gayvon gave her consent, the gun should not be excluded because it would have inevitably been found. When later challenged by the court as to why the consent should not be deemed a product of the illegal entry, the prosecution argued there was no exploitation of the illegal entry. There was no evidence to suggest Gayvon gave her consent as a result of any illegal activity by the officers. Logan argued the only reason Gayvon consented was because of all the officers in her apartment, and they detained and deceived her to gain her consent.

In denying the motion to suppress, the trial court found Logan had a reasonable expectation of privacy and the entry was illegal, but Gayvon's consent was voluntary and not the product of the illegal entry. The court stated that although the circumstances had "a hint" of submission to authority, there was no evidence Gayvon was simply submitting to authority when she gave her consent. The court observed the officer who had obtained Gayvon's consent was "professionally mellow . . . in his demeanor" while testifying. Finally, the court found the prosecution had shown any taint from the illegal entry had been adequately attenuated. After denial of his suppression motion, Logan entered guilty pleas to all charged offenses and admitted all allegations.

DISCUSSION

1. Suppression Motion

Logan argues the court erred in denying his motion to suppress because Gayvon's consent was not voluntary and, even if voluntary, the officers' illegal conduct tainted her consent and rendered it ineffective. We will address each contention in turn.

Our standard of review of a trial court's ruling on a motion to suppress evidence is well settled. As our Supreme Court stated in *People v. Carter* (2005) 36 Cal.4th 1114, 1140 (*Carter*), "'"An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review. [Citations.]"

"The trial court's factual determinations are reviewed under the deferential substantial evidence standard; its determination of the applicable rule of law is scrutinized under the standard of independent review. [Citation.] We independently assess as a question of law whether, under such facts as found by the trial court, the challenged action by the police was constitutional. [Citation.]" (*People v. Coulombe* (2000) 86 Cal.App.4th 52, 55-56 (*Coulombe*).)

Logan challenges the trial court's finding Gayvon voluntarily consented to the search of their apartment and car. (See *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1198 [third party with common authority over premises may consent to search].) "Where . . . the prosecution relies on consent to justify a warrantless search or seizure, it bears the 'burden of proving that the . . . manifestation of consent was the product of . . . free will and not a mere submission to an express or

implied assertion of authority. [Citation.]' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) On appeal, the prosecution must establish substantial evidence of voluntary consent. (*People v. Challoner* (1982) 136 Cal.App.3d 779, 781.)

Whether consent was voluntary is a factual issue to be determined from all the circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 233.) Here, there were conflicts between the officer's and Gayvon's versions of how her consent was obtained, which created factual disputes for the trial court to resolve. The trial court noted there was a "hint" of submission to authority, but ultimately concluded the consent was voluntarily given. The issue of voluntariness of consent is frequently decided on the basis of witness credibility, and here the court relied, in part, on the officer's "professionally mellow" demeanor during his testimony. The court also cited the signed consent form. It is clear from the record the trial court found the officer's account credible and the written consent form valid. It was not persuaded Gayvon was tricked or deceived into giving her consent or confused about the locations to be searched. We find the trial court's ruling the consent was voluntary was correct and supported by substantial evidence.

Next, Logan claims that Gayvon's consent was ineffective because it was not wholly independent of the officers' illegal conduct in entering the apartment without a warrant or legal exception to the warrant requirement. Any evidence procured as a result of a Fourth Amendment violation against the defendant must be excluded unless the prosecution establishes the illegality has become so attenuated as to dissipate the taint of the illegal conduct. (*Wong Sun v. United States* (1963) 371 U.S. 471, 487-488.) "[T]he taint of prior improper conduct can be attenuated. That attenuation can result from a subsequent voluntary consent to search." (*People v. Sanchez* (1981) 116 Cal.App.3d 720, 729.)

Logan asserts the prosecution bears the burden of demonstrating sufficient attenuation to purge the taint, and whether there was attenuation is a question of law this court reviews independently. We agree with both assertions. Logan correctly cites the analysis of attenuating circumstances: "Relevant factors in this 'attenuation' analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of the intervening circumstances, and the flagrancy of the official misconduct. [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 449 (*Boyer*).) "When the accused claims a consent to search is tainted by a prior Fourth Amendment violation, mere voluntariness of the consent is not enough to dissipate the taint. [Citations.] In such cases, we must additionally examine the 'attenuation' factors set forth in *Brown* [*v. Illinois* (1975)] 422 U.S. 590 . . . , to determine whether, on the particular facts, the twin purposes of the 'poisonous fruit' rule—to deter the exploitation of official misconduct and to promote judicial integrity—are outweighed by the cost of excluding the challenged evidence." (*Boyer, supra,* 38 Cal.4th at p. 450.)

We turn first to the temporal relationships between the illegal conduct and the seizure of evidence. For purposes of analyzing the temporal relationships we note there were essentially two searches. It was stipulated the gun, magazine, and sock were seized during the first search. The balance of the evidence sought to be suppressed was seized during the second search. There is no dispute an officer entered the apartment and went immediately to locate the gun in the kitchen cabinet as other officers conducted a protective sweep. Roughly 15 to 20 minutes passed between the protective sweep and Gayvon's consent.

The trial court directly addressed the attenuation issue. It stated the issue was "is the consent a result of the illegal entry, a product of the illegal entry, a fruit of the illegal entry, or exploitation of the illegal entry." The court reasoned nothing new

was learned as a result of the illegal entry. The gun was recovered based on information Logan had provided, not from an exploratory search of the apartment. The discovery of the gun was not used to gain Gayvon's consent. The court concluded the taint of the illegal conduct had been attenuated and Gayvon's consent was an independent source.

We find it significant the officers had knowledge of the presence of the gun in the kitchen cabinet prior to entering the residence. This fact supports the trial court's conclusion nothing new was learned as a result of the illegal entry. Officers reasonably concluded the gun posed a threat to the officers on the scene. There is no evidence the officers confronted Gayvon with the gun or any other evidence that had been seized in an effort to facilitate her consent. This leads us to the conclusion the illegal conduct was not exploited and temporally distinct from the illegal conduct.

We next turn to consideration of any intervening circumstances. Gayvon's consent was not solicited until after the officers had completed their protective search. While the search was conducted, Gayvon remained seated quietly on the couch. Her child was not disturbed and allowed to remain sleeping. Gayvon was given an opportunity to read the consent form and ask questions if she had any. After this opportunity, she signed the consent form. We realize the atmosphere of a police search would be disturbing, but the period between the entry and the request for consent did not evidence any coercive conduct by the officers.

Lastly, we consider the flagrancy of the police misconduct. Using the license plate number provided by a witness to a robbery, police officers obtained information regarding the residence associated with the suspect vehicle. Officers encountered Logan at that location just a few hours after the robbery. Logan matched the description of the robbery suspect, and the vehicle matched the witness's description of the vehicle. As police officers were about to contact the occupants of

the residence, they were advised by the officer detaining Logan there was a gun and magazine in a white sock in the kitchen cabinet. Rather than secure the residence and obtain a search warrant, the officers entered. Although the entry was illegal, considering the totality of the circumstances, we would not characterize the conduct as blatant or purposeful disregard for the law. What occurred here is better described as an intuitive—almost visceral—reaction by police officers to the presence of a gun not immediately within their control. The officers did not make entry to do an exploratory search of the apartment. Rather, an officer went directly to the kitchen cabinet to recover the gun while other officers conducted a protective sweep. We conclude the officers did not intend to deliberately violate Logan's Fourth Amendment rights. The conduct was not sufficiently flagrant so as to render any subsequent consent ineffective.

Having independently considered the attenuation factors in relation to the facts in this case, we conclude the trial court was correct when it found Gayvon's consent was valid and effective and it was not tainted by the officers' illegal conduct. In light of the foregoing, we need not address the Attorney General's contention the court erred in finding Logan had an expectation of privacy or that the doctrine of inevitable discovery applies.

2. Correction of Abstract of Judgment

A reviewing court may correct an error in the abstract of judgment on its own motion or upon the request of the parties. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-187.) Logan contends, and the Attorney General concedes, his presentence custody credit was miscalculated and Logan is entitled to an additional day of credit. Logan was arrested on April 14, 2006, and sentenced on January 11, 2008, giving him 638 days of actual custody, which with 95 days of local conduct credit entitles him to 733 days of credit.

Logan also contends, and the Attorney General also concedes, the abstract of judgment should be corrected to reflect the trial court's oral pronouncement of judgment. The trial court stayed the sentences on counts 2 and 3 pursuant to section 654. The abstract of judgment erroneously indicates the sentences on those counts were both concurrent and stayed.

DISPOSITION

The abstract of judgment is ordered modified to reflect 638 days of actual custody credit and 95 days of conduct credit, for a total of 733 days credit. The abstract of judgment is also modified to reflect that count 2 and count 3 are stayed pursuant to section 654. The judgment is affirmed as modified. The clerk of the superior court is ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.